

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT AND KATHRYN KASEBURG, et al.,)

Plaintiffs,)

vs.)

PORT OF SEATTLE, a municipal corporation;
PUGET SOUND ENERGY, INC., a Washington
for profit corporation and KING COUNTY, a
home rule charter county, and CENTRAL PUGET
SOUND REGIONAL TRANSIT AUTHORITY, a
municipal corporation

Defendants.)

No. 14-cv-00784-JCC

DEFENDANTS' REPLY IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
PLAINTIFF'S DECLARATORY
JUDGMENT CLAIM

NOTE ON MOTION CALENDAR:
June 19, 2015

ORAL ARGUMENT REQUESTED

By its express terms, the Trails Act operates "to preserve established railroad right[s]-of-way" and allow for interim trail use. 16 U.S.C. §1247(d). Although Plaintiffs claim ignorance as to what "preserve" might mean, *see* Resp. at 1 (Dkt. 98), the plain language of the statute, its legislative history, STB decisions, and relevant court decisions all compel the conclusion that

DEFENDANTS' REPLY IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S
DECLARATORY JUDGMENT CLAIM
(14-cv-00784-JCC) - 1

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1 railbanking operates to maintain the railroad easement while adding trail use.¹ Because no
 2 disputed issue of material fact exists, this Court should grant Defendants' motion for partial
 3 summary judgment.

4 **A. No Material Issues of Fact Preclude Summary Judgment**

5 Under Fed. R. Civ. P. 56, "[t]he court shall grant summary judgment if the movant shows
 6 that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
 7 matter of law." *See also Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013). Here, the
 8 question raised in Defendants' Motion for Partial Summary Judgment—Did railbanking under
 9 the Trails Act preserve the railroad easements in the corridor and allow for interim use of the
 10 corridor as a trail?—is properly answered as a matter of law because Defendants' declarations
 11 are unrefuted. Plaintiffs do not contest that this issue is resolvable as a matter of law.

12 Defendants filed and cited to numerous declarations establishing the factual framework
 13 supporting their partial summary judgment motion. As a result, under Rule 56, Plaintiffs had the
 14 burden to come forward with sufficient evidence establishing the existence of a disputed issue of
 15 material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct.
 16 1348, 89 L. Ed. 2d 538 (1986)).

17 Because Plaintiffs did not submit any counter-evidence, the record is amenable to a
 18 decision as a matter of law. There are no disputed facts when the party opposing judgment does
 19 not proffer any declarations. *Watts v. United States*, 703 F.2d 346, 348 (9th Cir. 1983). By
 20 failing to submit *any* declarations, Plaintiffs have created a record that "is so one-sided that one
 21 party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106

22 ¹ The dictionary establishes that "preserve" means "to keep safe from injury, harm, or
 23 destruction," "protect," "to keep alive, intact, in existence, or from decay," "to remain fresh or in
 its original state." Webster's Third New Int'l Dictionary at 1794 (2002).

1 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). In short, Defendants’ motion for partial summary
 2 judgment should be decided and granted based on the undisputed record submitted by
 3 Defendants.

4 **B. The Court Should Reject Plaintiffs’ Effort to Re-Argue Points That Were Already**
 5 **Rejected**

6 Without acknowledging this Court’s April 23, 2015 Order (“Order”) denying Plaintiffs
 7 motion for declaratory judgment (Dkt. 91), Plaintiffs continue to put forward the same arguments
 8 that this Court already rejected. For example, Plaintiffs spend the bulk of their twelve-page brief
 9 trying to incorrectly recharacterize Defendants’ position by arguing that “railbanking is not a
 10 railroad purpose,” and that under state law, railroad easements are generally abandoned with the
 11 cessation of rail operations. But this Court already has recognized that “Defendants do not
 12 appear to dispute these points . . . and such points do not go to the heart of the issue, which is
 13 whether a discontinuance in use, *when accompanied by operation of the Trails Act*, triggers an
 14 *extinguishment* of railway easements.” Order at 12 (emphasis in original).

15 It is immaterial whether railbanking is a “railroad purpose,” because the Trails Act
 16 preserves a railroad easement and preempts state reversion law through the mechanism of
 17 railbanking regardless of the easement’s original purpose. Indeed, Plaintiffs and their current
 18 counsel received nearly \$140 million in compensation for the associated taking in this railroad
 19 corridor because the Trails Act *prevented* the abandonment and extinguishment of the railroad
 20 easement while imposing the additional burden of trail use.

21 Plaintiffs again claim the support of cases “too numerous to cite,” but do not refer to *any*
 22 cases in their response brief apart from those that this Court already has considered in denying
 23 Plaintiffs’ original motion. Resp. at 8 n.3. They cite *Macy Elevator v. United States*, 105 Fed.

1 Cl. 195 (Fed. Cl. 2012) and the “22 cases” previously cited in their prior Motion for Declaratory
 2 Judgment (Resp. at 8 n.3), but this Court already found that:

3 Plaintiff’s leading case, *Macy Elevator*, 105 Fed. Cl. 195, does not sufficiently
 4 address the precise nature of the remaining burdens on that railbanked land, as
 5 *Macy Elevator* pertained to takings and compensation valuation issues. The other
 6 takings cases cited by Plaintiff likewise fail to establish that a change in use from
 7 railroad purposes will *extinguish* the rail easement when the Trails Act is invoked.
 8 The Port of Seattle presents ample support for their contention that “[n]one of
 these cases held that the original railroad easement no longer existed.” . . . Thus,
 Plaintiffs have failed to establish that, as a matter of law, a change in use from
 railroad purposes extinguishes the easement, even in situations in which the Trails
 Act has wrought its preemptive powers.

9 Order at 15. Plaintiffs’ make no effort to explain any flaw in this Court’s reasoning, which was
 10 firmly rooted in the statutory language and cases applying it.

11 Plaintiffs similarly assert—without any authority—that railbanking is merely effective in
 12 preserving the “physical dimensions” of a rail corridor “for future reactivation, not current use.”
 13 Resp. at 3-4. But the Court previously addressed and rejected this contention as well: “Plaintiffs
 14 fail to establish as a matter of law their contention that ‘the rail banking statute merely prevents
 15 the land from reverting back to landowners and preserves the physical characteristics of the
 16 corridor [but not the easement itself] in case reactivation ever occurs,’ at which time the
 17 easement presumably springs back into existence.” Order at 15 n.6. Plaintiffs again make no
 18 effort to improve on a theory that was previously rejected by this Court and at odds with the
 19 statute.

20 Finally, Plaintiffs again argue that *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308
 21 (1986) supports their theory, but fail to address this Court’s previous determination that “*Lawson*
 22 and *Squire Investment* do not establish, as a matter of law, that Plaintiffs’ position is correct.”

23 Order at 16. As Defendants pointed out in their motion for partial summary judgment, the

1 *Lawson* decision could not address the effect of railbanking on a Washington railroad easement
 2 because it did not involve an application of the Trails Act. The case may be on “all fours” in
 3 showing what happens in the *absence* of the Trails Act, but that is not the issue in the current
 4 case. Here, operation of the Trails Act through the railbanking process has preserved BNSF’s
 5 railroad easements and added the additional burden of a trail.

6 Plaintiffs do not offer any bases for the Court to retreat from its prior reasoning. In the
 7 absence of any material issues of fact, the Court should grant Defendants’ motion for partial
 8 summary judgment and hold that railbanking preserved the railroad easements and added the
 9 additional burden of a trail.

10 **C. Plaintiffs Fail to Overcome the Substantial Legal Authorities Cited by Defendants**

11 In all of their filings with this Court, Plaintiffs have attempted to shoe-horn the resolution
 12 of this lawsuit into the takings case law, even though this is *not* a takings case. Plaintiffs have
 13 made little or no effort to refute the myriad of legal sources that directly oppose their position.

14 **1. Plaintiffs Have Not And Cannot Refute The Federal Preemptive Effect Of**
The Trails Act And The ICC Termination Act

15 Plaintiffs do not acknowledge or attempt to argue against the federal preemptive effect of
 16 the ICC Termination Act (and its supporting cases) and the import of *City of Ford v. United*
 17 *States*, 106 Fed. Cl. 136 (2012). *See* Defendants’ Motion for Partial Summary Judgment (Dkt.
 18 95 at 21-22 and n.19). The unambiguous holding of *City of Ford* guides this Court’s analysis:

19 ...it is immaterial whether [BNSF] abandoned the right-of-way for purposes of
 20 [Washington] law. As the Federal Circuit explained in *Barclay v. United States*, 443 F.3d
 21 1368 (Fed. Cir. 2006), while state law generally creates property interests, the STB has
 22 “exclusive and plenary jurisdiction” to regulate railroad abandonments and the
 23 disposition of reversionary interests. 443 F.3d at 1374 (quoting *Preseault v. Interstate*
Commerce Comm’n, 494 U.S. 1, 8, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990)). Accordingly,
 federal, not state, law controls when abandonment occurs. *See id.* (“Abandonment cannot
 occur until authorized by federal law.”); *Nat’l Wildlife Fed’n v. Interstate Commerce*

1 *Comm’n*, 850 F.2d 694, 704 (D.C.Cir.1988) (“Nor may state law cause a reverter of a
2 right-of-way prior to an [STB]-approved abandonment.”).

3 *City of Ford*, 106 Fed. Cl. at 140 (“BNSF” and “Washington” substituted in brackets).

4 Accordingly, Washington abandonment law is irrelevant to the specific issue raised by this
5 motion because federal law and the Trails Act preempt any operation of state abandonment law.

6 **2. Plaintiffs Have Not Acknowledged -- And In Fact Misrepresent – the *Haggart*
7 Case**

8 In their briefing on this motion and their prior motion for declaratory judgment, Plaintiffs
9 fail to address or acknowledge Judge Lettow’s unambiguous articulation of the “before” and
10 “after” condition on which he based the measure of Plaintiffs’ takings compensation in *Haggart*
11 *v. United States*, 108 Fed. Cl. 70 (2012). In *Haggart*, the “after” condition of the Plaintiffs’
12 property was “uncontested”—it was “property burdened by a general easement permitting
13 recreational trail use with the potential for future railway use by way of rail-banking or possible
14 future development of a commuter rail line.” *Id.* at 96.

15 Similarly, Plaintiffs have never tried to refute Judge Lettow’s unambiguous holding that
16 “Rail-banking under the Trails Act preserves railroad-purpose easements which otherwise would
17 terminate by operation of law, thus retaining the easements for potential later reactivation of
18 railroad use.” *Id.* at 76 n.3. In fact, Plaintiffs’ only citation to *Haggart* is in support of the
19 nonsensical statement that “If the Defendants were correct that the railroad purposes easement
20 currently exists, the before value would be encumbered by a railroad purposes easement.” Dkt.
21 98 at 3:12-16 (*citing Haggart* at 96). That statement is nonsensical because (1) *Haggart* simply
22 doesn’t support what Plaintiffs suggest, and (2) on page 97, *Haggart* explains the exact opposite.
23 *Haggart* at 97-98 (“The [railroad] easements *would have* terminated through abandonment,
leaving Plaintiffs with unencumbered property, *but for the Trails Act, the NITU, and the rail-*

1 *banking provision*. The true ‘before’ state of the Plaintiffs’ property, *absent federal intervention*
 2 *through the action of the STB, would have been* a fee unencumbered by easements. Damages
 3 should therefore be calculated using the value of Plaintiffs’ property in unencumbered
 4 condition.”) (emphasis added).

5 **3. Plaintiffs Ignore All of the Cases and STB Decisions That Squarely Address** 6 **the Issue of What Property Rights Remain After Railbanking**

7 As pointed out in Defendants’ partial summary judgment motion, the case law is uniform
 8 that the Trails Act preserves the railroad easement rights while adding trail use. *See State v.*
 9 *Preseault*, 163 Vt. 38, 652 A.2d 1001, 1003 (1994); *Illig v. U.S.*, 58 Fed. Cl. 619 (2003);
 10 *Grantwood Village v. Missouri Pac. R.R. Co.*, 95 F.3d 654 (8th Cir. 1996); *Palmetto*
 11 *Conservation Found. v. Smith*, 642 F. Supp. 2d 518 (D.S.C. 2009). Plaintiffs fail to mention—
 12 much less discuss or distinguish—these cases in their responsive briefing. These cases directly
 13 answer the question currently before the Court and support entry of partial summary judgment
 14 for Defendants.

15 Plaintiffs similarly do not address the numerous Surface Transportation Board (“STB”)
 16 decisions cited by Defendants, stating, “the STB’s conclusions are incorrect procedurally and are
 17 incorrect legally under the Trails Act.” Resp. at 5. What is missing from Plaintiffs’ general
 18 criticism of the STB, however, is any reasoning as to why the STB’s decisions are incorrect. The
 19 STB is the federal agency charged with regulating rail corridors, including the corridor that is at
 20 issue in this case. In addressing the STB’s predecessor agency, the Interstate Commerce
 21 Commission (“ICC”), the Supreme Court noted, “judicial deference to reasonable interpretations
 22 by an agency of a statute that it administers is a dominant, well-settled principle of federal law.”
 23 *Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417, 112 S. Ct. 1394, 118 L.

1 Ed. 2d 52 (1992). Plaintiffs have “fail[ed] to establish that the ICC’s interpretations of its own
 2 statutes and regulations are unworthy of deference from this court.” *In re Transcon Lines*, 89
 3 F.3d 559, 567 (9th Cir. 1996).

4 For the foregoing reasons, Defendants respectfully ask this Court to grant their partial
 5 motion for summary judgment. As a result of railbanking under the Trails Act, the existing
 6 railroad easement was preserved and trail use was added to the rail corridor.

7 DATED this 19th day of June, 2015 at Seattle, Washington.

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DEFENDANTS' REPLY IN SUPPORT OF MOTION
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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

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1 DATED this 19th day of June, 2015 at Seattle, Washington.

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3 s/ Kris Bridgman
4 Kris Bridgman, Legal Secretary
5 King County Prosecuting Attorney's Office
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